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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. FRANCISCO LEROY WILLIAMS, Defendant and Appellant.	E047840 (Super.Ct.No. RIF144925) O P I N I O N

APPEAL from the Superior Court of Riverside County. Jean P. Leonard, Judge. Affirmed.

Stephen L. Miller, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and James D. Dutton and Melissa Mandel, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Francisco Leroy Williams, was convicted by a jury of felony assault with a deadly weapon, a violation of Penal Code section 245, subdivision (a)(1),[1] and misdemeanor corporal injury to a cohabitant, a violation of section 243, subdivision (e)(1).

The conviction for assault with a deadly weapon was based on defendant's conduct in throwing glass beer bottles in the direction of the victim.[2]

On appeal, defendant contends: (1) there was insufficient evidence to support a finding that he was guilty of assault with a deadly weapon; specifically, he argues that the bottles were not used as deadly weapons because he did not aim at the victim when he threw them; and (2) the court failed to fulfill its sua sponte duty to instruct the jury with CALCRIM No. 123, that a victim is referred to as "Jane Doe" only to protect her privacy, as required by law.

We hold there was substantial evidence to support the conviction of assault with a deadly weapon. We further hold the court did not err in failing to instruct the jury pursuant to CALCRIM No. 123. We therefore affirm the judgment.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] The evidence demonstrates there were two distinct incidents in which defendant threw a beer bottle in the direction of the victim. The jury was given an instruction on juror unanimity under Judicial Council of California Criminal Jury Instructions, CALCRIM No. 3500.

I. SUMMARY OF FACTS

Defendant and Doe began dating in late April 2008, two days after Doe's arrival from Mexico. Shortly thereafter, Doe moved in with defendant, who at the time was living in his car and at the homes of various friends. On the afternoon of July 31, 2008, defendant and Doe were at a friend's house in Moreno Valley. While there, defendant and Doe got into an argument because one of defendant's friends informed him that Doe planned to break up with him. During the argument, defendant told Doe to get out of the house. As she was leaving, defendant told her they were going to "go for a walk." Doe was frightened because she knew he would get very angry.

The two walked a short distance to an area in front of a trailer park; there they sat and continued arguing. Defendant started yelling at Doe, calling her names like "whore" and "dumb ass." Defendant then got up and stood about a meter to a meter and a half in front of her. Doe remained sitting, leaning against a wall. Defendant held a bottle of beer from which he had been drinking and cocked his arm like a football player throwing a football; he threw the bottle hard in her direction. The bottle went over Doe's head and shattered against the wall. Doe saw defendant throw the bottle, but was not sure whether he was throwing it at her or just throwing the bottle in a different direction. At the moment the bottle was released from defendant's hand, Doe was looking down. She did not move to get out of the way. Although the bottle did not hit Doe, a piece of shattered glass cut her left shoulder, leaving a scar.

After he threw the bottle, defendant hit Doe with an open hand on her right shoulder and told her to get out of there. Doe walked away and sat on a green electrical box about four feet away from where the first bottle had been thrown. Defendant walked across the street and sat on the sidewalk. Defendant threatened that he was going to kill her. Defendant then approached her; she stood up and he punched her with a closed fist on her chest.[3]

At some point while Doe was sitting on the electrical box, defendant approached and threw another glass beer bottle at her. Doe, who was crying, saw defendant wind up to throw the bottle as he had before, then she looked to the side. She did not duck or move. The second bottle also went over her head and smashed into the wall, causing it to shatter. Doe got wet from the contents of the bottle when it shattered against the wall. She felt defendant did intend to hit her with the second bottle.

Ignacio Reyes lived near where defendant and Doe were arguing. He heard people yelling and screaming. He walked outside his front door, saw a couple arguing, and saw the man throw a beer bottle, which "flew over [the woman's] head and smashed on the block wall behind her." Reyes testified that the bottle came "[v]ery close" to Doe and might have hit her if she had looked up. Reyes could not identify the man because the

[3] It is unclear from the record whether the punch to the chest was before or after the second bottle was thrown.

man's back was to him. At trial, there was conflicting testimony as to whether Reyes intervened.[4]

According to Reyes, after the couple argued near the concrete wall, the man left. As he walked away, he punched and broke a "For Sale" sign. After punching the sign, the man sat down on the curb at the corner of the street and Reyes went back inside his home.

Doe testified that at this point defendant told her they should go back to his friend's house. Although she was afraid, Doe returned to the house with defendant. As they walked back, he was grabbing her hand.

When they arrived at the friend's house, defendant again started yelling at her, and was spitting in her face. Before entering the house to get a beer, defendant began pushing Doe on her forehead with his index finger. When he returned outside he continued to argue with her; he threw Doe to the ground and kicked her leg about four times, resulting in a bruise. It was not until his friend pulled him off that defendant stopped kicking her. Doe further testified that defendant prevented her from leaving by pulling on her. When defendant went to the side of the house to urinate, Doe ran to Reyes's house and called her sister. Reyes then drove Doe to her sister's house, where the police were called.[5]

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[4] Doe says that Reyes intervened by saying "Hey," and that defendant challenged Reyes to a fight, but Reyes testified that after the bottle was thrown and the man walked towards the corner of his street, Reyes went in his house and they never exchanged words.

[5] There is conflicting testimony as to when the police arrived. Doe testified that when she and Reyes arrived at her sister's house, the police were already there.

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Doe also testified that defendant assaulted her on two prior occasions. Once, defendant hit her with an open hand on her head. On another occasion he slapped her on the head and tried to tear up her passport.[6]

II. ANALYSIS

A. *There Was Substantial Evidence That the Glass Beer Bottle Was a Deadly Weapon*

Defendant argues the evidence is insufficient to support his conviction of assault with a deadly weapon. He contends that when the bottles were thrown he was at such a close distance to Doe that if he wanted to hit her he could have; he asserts that because he did not hit her, he did not use the bottles in a manner consistent with them being a deadly weapon. We disagree.

When analyzing a sufficiency of the evidence claim, "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) "The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) Particularly

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However, Reyes testified that after they arrived at the sister's house, he went inside to call the police.

[6] Additionally, there was evidence that defendant had one prior felony domestic violence conviction.

important to our review in this case, the court cannot "reweigh the evidence, resolve conflicts in the evidence, draw inferences contrary to the verdict, or reevaluate the credibility of witnesses." (*People v. Little* (2004) 115 Cal.App.4th 766, 771; see also *People v. Lindberg* (2008) 45 Cal.4th 1, 27.)

Defendant concedes that his conduct in throwing the bottles is "susceptible to a finding of simple assault." He further acknowledges that a bottle, when used as a "club or missile," "can undoubtedly be a deadly weapon." (See *People v. Cordero* (1949) 92 Cal.App.2d 196, 199 [beer bottle thrown at victim]; *People v. Martinez* (1977) 75 Cal.App.3d 859, 862 [beer cans and beer bottles thrown at victims]; and *People v. Fagalilo* (1981) 123 Cal.App.3d 524, 528 [wine bottle thrown at victims].) Defendant simply contends he did not use the bottles in a manner consistent with them being deemed a deadly weapon.

"As used in section 245, subdivision (a)(1) a 'deadly weapon' is 'any object, instrument, or weapon *which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.*' [Citation.] Some few objects . . . have been held to be deadly weapons as a matter of law; the ordinary use for which they are designed establishes their character as such. [Citations.] Other objects, while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury. In determining whether an object not inherently deadly or dangerous is used as such, the trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue. [Citations.]" (*People v. Aguilar*

(1997) 16 Cal.4th 1023, 1028-1029, italics added.) The determination of the deadly character of the weapon is a question for the jury. (*People v. Helms* (1966) 242 Cal.App.2d 476, 486.)

Under the present facts, it is evident the respective bottles were used in a manner capable of and likely to produce death or great bodily injury. Defendant had been drinking. He was arguing with Doe and was in a violent and angry mood. He was yelling at Doe, calling her a "whore" and "dumb ass." On the first occasion, he was standing in front of Doe approximately three to five feet away; he cocked his arm, readying himself to throw the beer bottle. And, while Doe did not see defendant release the bottle, he obviously threw it in her general direction and close to her because broken glass from the shattered bottle struck her left shoulder. On the second occasion, after defendant had threatened to kill her, he again wound up to throw the bottle. After the bottle broke against the wall, Doe was sprayed with its contents. Reyes indicated the bottle went very close to Doe and could have hit her if she had been looking up.

In each of the throwing incidents, given the nature of the encounter between defendant and Doe, from the moment defendant aggressively raised the bottle and prepared to throw it, defendant committed an assault with a deadly weapon. As stated in *People v. Chance* (2008) 44 Cal.4th 1164, 1170, "'the crime of assault has always focused on the nature of the act and not on the perpetrator's specific intent. An assault occurs whenever "'[t]he next movement would, *at least to all appearance*, complete the battery.'" [Citiation.] Thus, assault "lies on a definitional . . . *continuum of conduct* that

describes its essential relation to battery: An assault is an incipient or inchoate battery . . . .' [Citation.]'" Here, defendant, in aggressively raising the bottles while standing in close range in front of Doe, was already engaging in an incipient or inchoate battery. Clearly, the next movement, at least to all appearances, would be the striking of Doe with the bottle. If struck by a partially full glass bottle of beer, Doe would likely sustain great bodily injury, most probably by broken or sharp glass.

Defendant argues he did not use or intend to use the bottles as deadly weapons because, despite throwing the bottles at close range, neither bottle directly hit Doe. While the argument could be plausibly made to a jury, a reasonable trier of fact could easily conclude that defendant, who had been drinking, intended to hit Doe but was simply a bad shot.

Indisputably, a beer bottle can be a deadly weapon. In this case, we conclude there is ample evidence to support the jury's conclusion that the bottles were, in fact, used as such.

B. *The Trial Court Did Not Err in Failing to Instruct the Jury With CALCRIM No. 123*

Defendant argues the trial court had a sua sponte duty to instruct the jury with CALCRIM No. 123 and that the failure to do so prejudiced defendant in the eyes of the jury. CALCRIM No. 123 states: "In this case, a person is called (John/Jane) Doe. This name is used only to protect (his/her) privacy, as required by law."[7]

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[7] CALCRIM No. 123 also adds the following bracketed text: "[The fact that the person is identified in this way is not evidence. Do not consider this fact for any purpose.]" According to the Bench Notes for this instruction, these sentences are to be

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Defendant concedes that CALCRIM No. 123 has been construed to apply only to sex offense cases so as to protect the true names of the victims. (See § 293.5.)[8] Nevertheless, he maintains that the sua sponte instructional duty provided in section 293.5 applied here because there is no reason to give such an instruction in a case dealing with a sex crime and not in a case not involving a sex crime. We do not agree.

Section 293.5, which permits alleged victims of sex offenses to be identified as "Jane Doe" rather than by their true names, is "intended to protect the privacy of victims of sex offenses, to encourage such victims to report the offenses so that rapists may be apprehended and prosecuted, and to protect these victims from harassment, threats, or physical harm by their assailants and others. [Citations.]" (*People v. Ramirez* (1997) 55 Cal.App.4th 47, 53.) Because of the plain language of the statute, as well as the legislative intent behind section 293.5 and the decisions interpreting it, it is clear that it applies only to sex offenses. Moreover, there is a clear distinction between a victim of a sexual assault in general and, as in this case, a victim of a battery against a cohabitant.

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included "on request." Here, there was no request for the instruction at all, let alone the bracketed sentences.

[8] Section 293.5, subdivision (a), provides that the court may, under certain circumstances, order that the identity of an alleged victim of a sex offense be identified "in all records and during all proceedings to be either Jane Doe or John Doe, if the court finds that such an order is reasonably necessary to protect the privacy of the person and will not unduly prejudice the prosecution or the defense." If the court makes such an order in a jury trial, "the court shall instruct the jury, at the beginning and at the end of the trial, that the alleged victim is being so identified only for the purpose of protecting his or her privacy pursuant to this section." (§ 293.5, subd. (b).)

Oftentimes the aggressor of a sexual assault does know the name of the victim. Identifying the victim as Jane Doe at trial pursuant to section 293.5 and CALCRIM No. 123 facilitates the protection of the victim from harassment and further physical harm. When, as in this case, the victim is a cohabitant of the defendant, the aggressor already knows the victim. The rationale of protecting the victim is thus diminished or inapplicable in such cases.

In his opening brief, defendant contends it was error not to give the instruction because "[t]he entire case against [defendant] was substantially based on the girlfriend's testimony" and the "jury clearly had reservations about this testimony because they found [defendant] not guilty on the count one allegation 'of inflicting injury on his former cohabitant[.]'" Thus, the jury "necessarily rejected the girlfriend's testimony" and "may not have entirely trusted the testimony of the girlfriend[.]" Even if the jury had reservations about Doe's testimony, we fail to see how this relates to the need to give CALCRIM No. 123 or any prejudice that could result from the failure to give the instruction.

In his reply brief, defendant argues that by not giving the instruction, an aura of a frailty enveloped Doe such that she was a person who needed extra protection from the courts; he contends this prejudiced him. Again, we are not persuaded. Initially, this argument seems to contradict defendant's original argument that the jury did not fully believe Doe's testimony because defendant was convicted of a lesser included offense in count 1 as opposed to the charged offense. Moreover, the argument is not supported by

the record. The reporter's transcript indicates that prior to Doe's testimony, the jury was told: "Ladies and gentlemen, this is 'Jane Doe,' the individual named in the Information. We will allow the attorneys to call her (Jane Doe) for this hearing but, as I said, it's not to go out of this room, and madam reporter will amend any transcripts that are prepared for this case to indicate 'Jane Doe.'" The use of the parentheses surrounding "Jane Doe" indicates that the victim's actual name was used in court and was replaced in the transcript with "Jane Doe" by the court reporter. The placement of "Jane Doe" inside parentheses occurs throughout the transcript. Thus, although the *transcription* of the trial was prepared to refer to the victim as Jane Doe, it appears her real name was used throughout the proceedings. Any sense of frailty that may have been caused by the use of the "Jane Doe" designation in the charging pleading was therefore diminished, if not eliminated, by the fact that the attorneys did, in fact, refer to Doe throughout the trial by her real name. Accordingly, we reject defendant's argument.

III. DISPOSITION

The judgment is affirmed.

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/s/ King
J.

We concur:

/s/ Hollenhorst
Acting P.J.

/s/ Richli
J.